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No. 18

In the Supreme Court of the United States

OCTOBER TERM, 1957

INTERNATIONAL BOXING CLUB OF NEW YORK, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 650

INTERNATIONAL BOXING CLUB OF NEW YORK, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1 (c), of the Revised Rules of this Court, appellee moves that the judgment of the district court be affirmed on the ground that the questions upon which decision of the cause depends do not require further argument.

STATEMENT

This is an appeal from the final judgment of the district court in a civil action which charged the defendants with conspiring to restrain, conspiring to monopolize, and monopolizing the business of promoting professional championship boxing contests from about January 1949 to the date of the filing

of the complaint on May 15, 1953, in violation of Sections 1 and 2 of the Sherman Act.

The district court dismissed the complaint upon the ground that the Sherman Act does not apply to the activities charged in the complaint. On appeal, this Court held that the defendants were not within the *stare decisis* doctrine applied in *Toolson* v. *New York Yankees*, 346 U. S. 356, and that the complaint stated a cause of action. *United States* v. *International Boxing Club*, 348 U. S. 236. The Court stated that, apart from any exemption from the Act grounded on *stare decisis*, the Government's allegations clearly bring the defendants within the scope of the Act; that, while a boxing match is "a local affair", the statute applies to a business based on the promotion of such matches if the business is itself engaged in interstate commerce or if it imposes illegal restraints on interstate commerce; and that the allegation that over 25% of the revenue from championship contests is derived from interstate operations through the sale of radio, television, and motion-picture rights is in itself sufficient to establish the interstate impact of the alleged restraints and monopolization of trade and commerce. 348 U. S. at 240–241.

After trial of the issues, the district court made findings of fact (App. 6–52 [1]) which fully sustain the allegations of the complaint. The following are among the salient facts so found:

In January 1949, and for many prior years, defendants James D. Norris and Arthur M. Wirtz owned,

[1] We use the abbreviation "App." to refer to the Appendix to appellant's jurisdictional statement.

controlled and operated the major indoor arena in each of three principal cities, Chicago, Detroit, and St. Louis (fngs. 93–95, 100). These defendants also owned, directly or indirectly, more than 50,000 shares of the stock of Madison Square Garden Corporation, the owner and operator of Madison Square Garden ("Garden"), the best known sports arena in the United States (fngs. 3, 87, 102). For a long time, the Garden had been in effect a partner with Michael S. Jacobs and his corporation, Twentieth Century Sporting Club (collectively referred to herein as Jacobs), in promoting both championship and non-title boxing contests, and Jacobs had an exclusive lease of the Garden for boxing contests running to May 31, 1951 tests (fngs. 112–115).

In 1948 and early 1949, Norris, Wirtz and Joe Louis, then heavyweight champion of the world, formulated and carried out a plan providing for the retirement of Louis as champion, a series of contests between the four leading contenders to determine the new champion, and the vesting in Norris and Wirtz of the exclusive right to promote these matches and exclusive radio, TV and motion-picture rights for these contests (fngs. 106–113). Norris and Wirtz thereupon formed the defendants International Boxing Club of New York, Inc., and International Boxing Club, Inc. (referred to respectively as IBC (N. Y.) and IBC (Ill.)), to promote professional boxing contests (fngs. 112–115).

Norris and Wirtz, being now in a position to compete with the Garden in promoting championship fights (fng. 124), proposed to the Garden that they

"work together now and keep the events for our buildings and not create a competitive situation that would be harmful to all" (fng. 120). The parties thereupon agreed to join forces (fng. 122). Among the terms agreed upon and carried out were these: common boards of directors (consisting of Norris, Wirtz, two Garden officials, and Joe Louis) for the two IBC corporations; a specified allocation of championship boxing contests between these corporations; and a specified division of their profits (fngs. 123, 125).

A condition of the agreement was that Jacobs' Garden lease be cancelled, and such cancellation was obtained for a cash consideration (fng. 126). In May 1949, Jacobs, for a further cash payment, assigned to the Garden his exclusive leases of Yankee Stadium and the St. Nicholas Arena for presentation of professional boxing contests, and his exclusive contract with the then welterweight champion (fngs. 129–131). Jacobs and his corporation "were thus eliminated as competitors in the promotion of championship contests" (fng. 133).

The Garden, in accordance with an understanding with Norris and Wirtz, purchased all the stock of Tournament of Champions, Inc., and thereby eliminated it as a competitor. This corporation, in which Columbia Broadcasting System had a stock interest, was authorized to promote boxing matches and had an exclusive contract with the then middleweight champion. In connection with the Garden's stock purchase, it gave Columbia Broadcasting System, for a period of five years, first refusal of radio and TV

rights for a weekly series of boxing contests at the Garden. (Fngs. 134–147.)

The defendants agreed to require each championship contender to give them exclusive rights to promote all his subsequent championship matches for a period of three years, and exclusive radio and TV rights as to these matches (fngs. 161–162). They controlled, as far as boxing was concerned, the Garden, St. Nicholas Arena, Yankee Stadium, and Polo Grounds in New York City, and the principal Chicago, Detroit and St. Louis arenas (fng. 158). Their combination empowered them to exclude competitors (fng. 168). Of the 44 professional boxing championship contests during the period from June 1949 to May 15, 1953, they either promoted or controlled the promotion of 36, or more than 80% (fngs. 169–170, 173).

Their business was carried on by means of frequent interstate communication by mail, telephone and wire, and interstate travel (fngs. 27–28). Of total receipts of some $7,100,000 from the 36 championship contests which they controlled, approximately $2,391,000, or 33.7% was derived from sale of radio, TV and motion-picture rights (fng. 38). The receipts from sale of radio and TV rights were about $1,175,000 ($2,391,000, less $616,000 received from sale of motion-picture rights (fng. 46)), or over 25% of the total revenue from championship contests.

The court, after making its findings of fact and determining that defendants had violated the statute, held a hearing on the relief to be incorporated in its judgment. Following this hearing, the court set forth

the conclusions it had reached in its Opinion Sur Form of Decree (App. 1a–11a).

The court's final judgment (App. 14a–24a) contains various injunctive provisions which appellants do not question, and we briefly note only the provisions primarily attacked. Norris and Wirtz are required to divest themselves of all of their Garden stock by selling this stock within five years and by transferring it in the interim to a court-appointed trustee vested with all voting rights and directed to sell within two years any stock remaining unsold at the end of five years (pars. 8–10). The two IBC corporations must be immediately dissolved (par. 21). For a period of five years, the Garden must, if so requested, lease its premises, on reasonable rental and other terms, for a professional championship boxing contest to be held on a specific day (par. 18), and it may not itself promote more than two professional championship contests during any twelve-month period (par. 16). The same requirements are imposed as to the Chicago Stadium so long as it is controlled by Norris and Wirtz or either of them (pars. 17, 19).

ARGUMENT

I

We submit that the appeal presents no question of substance as to the district court's decision on the merits. Certainly the question whether *United States* v. *International Boxing Club*, 348 U. S. 236, "should stand" (J. St. 12) is not substantial. During the last term of Court, the holding of this case was re-

affirmed. *Radovich* v. *National Football League*, 352 U. S. 445.

Appellants show no error in the criteria which the district court used in determining the "relevant market". (see J. St. 12). The court found that there is a "particular and special demand" for radio, TV, and motion-picture rights for championship contests "in contradistinction to similar rights to non-championship contests", and "particular and special demand" by promoters and by spectators for the former contests "in contradistinction to" the latter (fngs. 61–62, 64, 66). Defendants' average receipts from the former were $154,000 and $40,000 from the latter, and their respective "Nielson" TV ratings were 74.9% and 57.7% (fngs. 51, 54). The defendants themselves recognized the "special attractiveness and peculiar qualities incident to the promotion of championship contests"; they allocated only these contests as between Norris-Wirtz and the Garden and their exclusive contracts with pugilists were limited to championship contests (fngs. 57–58).

Possession of "power to control prices or exclude competition" constitutes illegal monopolization, and whether or not this power exists may depend upon whether the defendants' product is part of a larger market "composed of products that have reasonable interchangeability * * * price, use and qualities considered". *United States* v. *du Pont de Nemours & Co.*, 351 U. S. 377, 391, 404. While the test is constant, the "varying circumstances of each case determine the result". *Id.*, at 395.

Here, the facts which the court found clearly warrant its factual conclusions that there is not "reasonable interchangeability" between non-championship and championship boxing contests either "as a financial proposition or as an entertainment media (sic)"; that, from the standpoint of both public appeal and financial return, "championship contests are on a plane which clearly distinguishes them from non-championship fights"; that the two are qualitatively so different "as to establish an identity of the one distinguished from the other" (App. 54–55).

II

Appellants' attack upon provisions of the judgment must be considered in the light of the established rule that determination of the relief to be accorded against violators of the Sherman Act "is peculiarly the responsibility of the trial court," which normally is more familiar with the record and the need for corrective action than a reviewing court. *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 89. The trial court has "a wide range of discretion * * * to mould the decree to the exigencies of the particular case", and this Court will not direct a change "except on a showing of abuse of discretion." *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 185. However, abuse of discretion falling short of "gross abuse" may call for reversal. *Gypsum* case, *supra*, at 89.

In the instant case, the court below did not exceed its discretion in determining the need and appropriateness of each of the judgment provisions which appellants attack.

1. *Required Divestiture of Garden Stock.* In decisions covering a span of more than 50 years, this Court has recognized that divestiture of capital stock or physical assets is an appropriate remedy to apply in order effectively to terminate, and dissipate the consequences of, violations of the Sherman Act.[2] In many situations, if the judgment merely forbade repetition of the illegal conduct, "those who had unlawfully built their empires could preserve them intact." *Schine Theatres* v. *United States*, 334 U. S. 110, 128. Divestiture or dissolution serves several functions (*id.*, 128–129):

> (1) It puts an end to the combination or conspiracy when that is itself the violation. (2) It deprives the antitrust defendants of the benefits of their conspiracy. (3) It is designed to break up or render impotent the monopoly power which violates the Act.

The district court, in its opinion on relief, declared that the defendants still possess and exercise "monopolistic control in the field of championship contests" and that their combination "is still in operation in violation

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[2] For early cases, see *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61; *United States* v. *Reading Co.*, 253 U. S. 26; *United States* v. *Lehigh Valley R. R. Co.*, 254 U. S. 255; *United States* v. *Southern Pacific Co.*, 259 U. S. 214.

For more recent decisions, see *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Hartford-Empire Co.* v. *United States*, 323 U. S. 386; *United States* v. *National Lead Co.*, 332 U. S. 319, 363; *United States* v. *Paramount Pictures*, 334 U. S. 131, 151–153, 174–175.

of the law" (App. 3a, 4a). Divestiture by Norris and Wirtz of their Garden stock was necessary, the court said, in order to make possible competition for championship contests between the Garden, on the one hand, and the Chicago, Detroit and St. Louis arenas, still controlled by Norris and Wirtz, on the other (App. 5a). And the required divestiture was in no respect "punitive" (cf. J. St. 12); a total of seven years was allowed for effecting it (judgment, par. 9).

2. *Dissolution of the IBC Corporations.* In its opinion on the judgment to be entered, the court said that these corporations were created to serve as "instrumentalities" of defendants' illegal conspiracy; that they were used to this end as defendants' "promotional arms"; and that each has assets "of but nominal value except for the goodwill attaching to their names by virtue of the conspiracy" (App. 7a). We submit that these are sufficient reasons for wiping the slate clean so far as these corporations are concerned. The required dissolution does not prohibit any other defendant from promoting boxing contests or from forming new promoting subsidiaries.

3. *Compulsory Leasing of Garden and Chicago Stadium and Limitation on their Promotion of Championship Contests.* The court's opinion on judgment provisions points out that the defendants accomplished the objectives of their conspiracy by combining both control of promotion and control of the arenas best suited for successful staging of championship contests (App. 7a). The court therefore deemed it necessary to assure that, for a period of five years, the two foremost arenas would not be closed to other

promoters, by providing for their compulsory leasing and by limiting the number of contests which each might promote in any twelve-month period (App. 6a–7a). These plainly were reasonable means of achieving a proper objective. A "public interest" served by the Government's civil antitrust suits "is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints." *International Salt Co.* v. *United States*, 332 U. S. 392, 401. To the same effect, see *United States* v. *Paramount Pictures*, 334 U. S. 131, 191.

4. *Restrictions Not Confined To Championship Contests.* Appellants so characterize paragraphs 1 (e), 3, 4, 5, 7 and 15 of the judgment (J. St. 6). We submit that this is an erroneous characterization of paragraphs 1 (e) and 7. Paragraphs 3, 4 and 5 do enjoin defendants from entering into (a) any agreement which provides that a boxer shall not engage in a professional boxing contest for a non-defendant, and (b) any agreement with an arena owner which provides that the arena shall not be leased to a non-defendant for the purpose of promoting a professional boxing contest. If the prohibition against exclusive contracts with boxers did not encompass all boxing contests, defendants might be able to tie up all important championship contenders and thus indirectly continue their control of promotion of championship contests. Likewise, if defendants were free to close arenas to other promoters of boxing contests, this would facilitate continuation of their exclusion of competitors from arenas suitable for staging championship contests. "When the purpose to restrain trade appears

from a clear violation of law, it is not necessary that all the untraveled roads to that end be left open and that only the worn one be closed." *International Salt* case, *supra*, 332 U. S. at 400.

Paragraph 15 merely prohibits Norris and Wirtz, on the one hand, and the Garden, on the other hand, from jointly promoting, or making any agreement relating to the promotion of, any professional boxing contest. This is an appropriate and necessary measure to prevent continuation of the type of illegal restraint and monopolization, achieved through combination, of which the defendants have been found guilty. This Court has upheld the request that there should be incorporated in a Sherman Act judgment a prohibition encompassing more than the illegal conduct which had been established. See *Gypsum* case, *supra*, 340 U. S. at 90.

5. *Failure to Give Option between Garden's Abandonment of Championship Fight Promotions and Severance of Norris-Wirtz from Garden Ownership and Management.* The option question thus presented (J. St. 5) is based on a resolution adopted by the Garden's board of directors on June 20, 1957, after the court had indicated at the hearing on relief the views set forth in its opinion on relief rendered four days later. The resolution, Exhibit DDD for identification, reads so far as pertinent:

> RESOLVED, That this corporation request the United States District Court * * * to include in the decree to be entered a provision that, if this corporation, at its option, files an undertaking with the Court that it will not engage in

> the promotion of professional championship boxing contests for a period of three, four or five years, or such other period as the Court may deem appropriate, the Court will not require Messrs. Norris and Wirtz to sell their stock in this corporation, to resign as officers and directors or to cease having any participation in the management of the corporation.

The court was plainly justified in rejecting this eleventh hour proposal. The crux of defendants' combination was the union of the Garden and the Norris-Wirtz interests. If the judgment had permitted this union to continue, a mere prohibition against promotion of championship contests by the Garden would not "effectively pry open to competition" the market closed by defendants' illegal restraints (see *International Salt, supra,* p. 11), and would fall short of terminating defendants' stranglehold on promotion of professional boxing championship contests. A judgment so limited would not restore competition for such contests between Norris-Wirtz and the Garden, elimination of which was a primary objective of defendants' combination. Permitting Norris-Wirtz to retain their control of the Garden would, in effect, nullify the crucial judgment prohibition (par. 15) against joint promotion of professional boxing contests by Norris-Wirtz and the Garden. It would also mean that the defendants, who now completely dominate the field and control the principal arenas in Chicago, Detroit, and St. Louis, would be free to use their dominance to build up some other arena, such as the St. Nicholas Arena, as the staging center for championship contests in

New York City, thus militating against successful entry into the field by other promoters. Furthermore, the very lateness of the option suggested, put forward after the court had heard the parties on their rival proposals as to relief and had formulated its own views, was in itself ground for rejection.

CONCLUSION

The decision below is correct, and this appeal presents no question which requires further briefing or argument. It is therefore respectfully submitted that the judgment of the district court should be affirmed.

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